

**Tan Cheng Hing v
Federal Metal Printing Sdn Bhd & Anor**

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO
R3-25-116 OF 1997
FAIZA TAMBY CHIK J
19 MAY 1999

*Labour Law — Employment — Dismissal — Whether dismissal or resignation —
Burden to prove constructive dismissal on applicant — Whether proved*

The applicant was employed by the respondent as an industrial engineer in June 1991. Between April and June 1994, the respondent had proposed two transfers to the applicant. By a letter dated 27 June 1994 ('exh CL-5'), the applicant informed the respondent that he would leave his service on 4 July 1994. It was observed that exh CL-5 disclosed: (i) the applicant's unhappiness over his proposed transfer; (ii) the respondent had agreed to pay four months' salary as compensation for loss of employment; and (iii) the applicant was constantly pressured by the respondent to leave the company. The applicant then made a representation to the Industrial Relations Department that he had been unfairly dismissed by the respondent. The matter was referred to the Industrial Court. The respondent testified that the applicant told him he wanted to leave the company and asked him whether the company could pay him four month's salary. The company agreed to pay the applicant four months' salary in recognition of his service with the company. It was submitted that the four months salary was not put under compensation for loss of employment because it was the applicant who wanted to leave the company. The Industrial Court dismissed the applicant's claim on the ground that there was no convincing evidence from the applicant that he was asked to resign or leave the company as alleged by him. The applicant applied for orders of certiorari and mandamus against the Industrial Court's award.

Held, dismissing the application:

- (1) The contents of CL-5 clearly do not reflect the situation of an employee being pressured or driven out of employment. It does not seem logical for the applicant to on the one hand claim that he was pressured to leave but on the other to write to the company and inform them of his whereabouts and confirm that he will be returning to work on 2 July 1994 and that his last day would be 4 July 1994. The fact of the matter was that he wanted some financial assistance before resigning which was agreed by the company (see p 570B-C).
- (2) The applicant did not in his letter claim constructive dismissal or even address the issue of transfer. The proposed transfer did not tantamount to a fundamental breach bearing in mind the fact that the respondent had the right to transfer and both proposals were

- A at the very outset rejected by the applicant. The contents of CL-5 clearly reflect it more to be a letter of resignation of the applicant rather than a claim for constructive dismissal (see pp 571E-F, 572A-B).
- B (3) The Industrial Court had properly guided itself in terms of the burden of proof and the law relating to claims for constructive dismissal. From the documentation and evidence before it, the Industrial Court came to a finding of fact that on the totality of evidence, the appellant had resigned from the respondent company on his own accord and as such dismissed his claim for constructive dismissal (see p 573H-I).
- C (4) The Industrial Court did not reach absurd results or reached results absurdly. The Industrial Court had applied the correct test and came to a finding of fact that the applicant had failed to discharge the necessary burden that he had been constructively dismissed. It had taken into account all relevant matters/facts and did not consider irrelevant facts/matters when coming to its decision. It must be observed that the High Court in exercising its supervisory jurisdiction over inferior tribunals are reluctant to interfere in the findings of such tribunals especially when the tribunal concerned had applied the right test and came to a finding of fact which in all circumstances was not absurd (see p 574F-H).
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[Bahasa Malaysia summary]

- F Pemohon telah diambil bekerja oleh responden sebagai seorang jurutera perindustrian pada bulan Jun 1991. Antara bulan April dan Jun 1994, responden telah mengusulkan dua pemindahan kepada pemohon. Melalui surat bertarikh 27 Jun 1994 ('eksh CL-5'), pemohon telah memaklumkan kepada responden bahawa beliau akan menamatkan perkhidmatan beliau pada 4 Julai 1994. Pemerhatian telah menunjukkan bahawa eksh CL-5 telah memperlihatkan:
- G (i) ketidakgembiraan pemohon terhadap cadangan pemindahan beliau; (ii) responden telah bersetuju untuk membayar empat bulan gaji sebagai pampasan terhadap kehilangan pekerjaan; dan (iii) pemohon sentiasa mendapat tekanan daripada responden supaya meninggalkan syarikat tersebut. Pemohon kemudiannya membuat satu representasi kepada Jabatan Perhubungan Perusahaan bahawa beliau telah dipecat secara tidak adil oleh responden. Perkara ini telah dirujuk kepada Mahkamah Perusahaan. Responden memberi keterangan bahawa pemohon telah memberitahu beliau tentang keinginan untuk meninggalkan syarikat tersebut dan menanyakan sama ada syarikat tersebut boleh membayar kepada beliau empat bulan gaji. Syarikat tersebut bersetuju untuk membayar pemohon empat bulan gaji tersebut sebagai menghargai perkhidmatan beliau dengan syarikat tersebut. Ia telah dihujahkan bahawa gaji empat bulan tersebut tidak diletak di bawah pampasan terhadap pekerjaan kerana
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pemohon yang hendak meninggalkan syarikat tersebut. Mahkamah Perusahaan telah menolak tuntutan pemohon atas dasar bahawa tiada bukti yang meyakinkan daripada pemohon yang beliau telah disuruh untuk meletak jawatan atau meninggalkan syarikat tersebut sebagaimana yang didakwa oleh beliau. Pemohon memohon arahan certiorari dan mandamus terhadap award Mahkamah Perusahaan tersebut.

Diputuskan, menolak permohonan tersebut:

- (1) Kandungan eksh CL-5 jelas tidak menggambarkan keadaan seorang pekerja di bawah tekanan atau didorong keluar daripada perkerjaan. Ia tidak munasabah untuk pemohon pada mulanya menuntut bahawa beliau ditekan untuk berhenti tetapi kemudian menulis kepada syarikat dan memaklumkan mereka tentang di mana beliau berada dan mengesahkan bahawa beliau akan kembali bekerja pada 2 Julai 1994 dan bahawa hari terakhir beliau ialah pada 4 Julai 1994. Pada hakikatnya, beliau memerlukan bantuan kewangan sebelum berhenti sepertimana yang telah dipersetujui oleh syarikat tersebut (lihat ms 570B-C).
- (2) Pemohon tidak di dalam surat beliau menuntut pemecahan konstruktif mahupun mengutarakan isu pemecatan tersebut. Cadangan pemecatan tersebut tidak membentuk pelanggaran asas dengan mengambil kira fakta bahawa responden mempunyai hak untuk memindahkan pemohon dan kedua-dua cadangan beliau telah ditolak oleh pemohon pada permulaannya lagi. Kandungan eksh CL-5 dengan jelas menggambarkan bahawa surat tersebut lebih merupakan surat peletakan jawatan dari pemohon daripada suatu tuntutan untuk pemecatan konstruktif (lihat ms 571E-F, 572A-B).
- (3) Mahkamah Perusahaan telah memberi panduan dengan betul mengenai beban membuktikan dan undang-undang yang berkaitan dengan tuntutan untuk pemecatan konstruktif. Berdasarkan dokumentasi dan bukti yang dihadapkan, pemohon telah meletak jawatan daripada syarikat responden atas kerelaan beliau sendiri dan oleh demikian, mahkamah menolak tuntutan untuk pemecatan konstruktif beliau (lihat ms 573H-I).
- (4) Mahkamah Perusahaan tidak mencapai keputusan yang melampau atau mencapai keputusan secara tidak munasabah. Mahkamah Perusahaan telah menggunakan ujian yang betul dan mencapai kepada penemuan pendapat bahawa pemohon telah gagal untuk melepaskan beban yang perlu di mana beliau telah dipecat secara konstruktif. Semua perkara/fakta yang berkaitan telah diambil kira dan fakta-fakta/perkara-perkara yang berkaitan tidak diambil kira di dalam mencapai satu keputusan. Hendaklah diteliti bahawa sebuah Mahkamah Tinggi di dalam menjalankan bidang kuasa pengawasan ke atas tribunal-tribunal bawahan akan enggan campur tangan dalam pendapat tribunal-tribunal tersebut terutama apabila tribunal yang berkenaan telah menggunakan

- A pemakaian ujian yang betul dan telah menemui pendapat yang di dalam semua keadaan bukanlah tidak munasabah (lihat ms 574F-H).]

Notes

- B For cases on dismissal, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 723-730.

Cases referred to

- C *Antah Sandilands Sdn Bhd v Teh Sing* [1994] 2 ILR 40 (refd)
Food Specialities (M) Sdn Bhd v M Halim bin Manap @ Abd Manaf [1992] 2 ILR 311 (refd)
Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129 (refd)
Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)
- D *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 (refd)
Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 (refd)
Regal Transport Co Sdn Bhd Ipoh v Transport Workers' Union [1987] 1 ILR 247 (refd)
- E *Western Excavating (Ecc) Ltd v Sharp* [1978] 1 All ER 713 (refd)
William Jacks & Co (M) Sdn Bhd v S Balasingam [1997] 3 AMR 2585 (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (refd)
- F *P Kuppusamy (KC Wong with him) (P Kuppusamy & Co)* for the applicant.
T Thavalingam (Shearn Delamore & Co) for the respondent.
- Faiza Tamby Chik J:** This is an application for orders of certiorari and mandamus in respect of Industrial Court Award No 377 of 1997 dated 6 August 1997, made in Industrial Court Case No 5/4-266/97.
- G The brief facts of this case are as follows:
- (i) The applicant was employed by the first respondent with effect from 12 June 1991 as an Industrial Engineer. His letter of appointment dated 12 June 1991 is marked exh CL-1 (see p 20 encl 9).
- H (ii) A perusal of CL-1 shows that at the bottom of the aforesaid document, it is expressly stated that the company is a 'member of the Kian Joo Group'.
- (iii) It is not disputed that the respondents had proposed two (2) transfers to the applicant between April and June 1994. The first proposal was to Metal Pak, an associated company located in Shah Alam and the second to Canco Engineering located at its headquarters (Kian Joo) in Batu Caves.
- I (iv) The applicant informed the first respondent that he would leave on

4 July 1994 (see the applicant's fax dated 27 June 1994 and The Puteri Pan Pacific Hotel Johor Bahru letter head, marked exh CL-5 (see p 22 encl 11)).

- (v) The applicant then made a representation to the Industrial Relations Department that he had been unfairly dismissed by the first respondent. The matter was referred to the Industrial Court for an award. The Industrial Court dismissed the applicant's claim through Award No 377 of 1997.

The issue raised by the applicant is whether the Industrial Court failed to properly take into consideration the fact that:

- (i) the applicant was invited to resign;
(ii) the applicant was told he had no future in the company and was given an ultimatum;
(iii) the applicant was told that the termination would have to be brought about by his own resignation letter.

Exhibit CL-5 is the last correspondence from the applicant to the first respondent. In verbatim exh CL-5 reads:

Dear Sir,

I can't go to work from 27 June 1994 Monday to 1 July 1994 Friday which I had called Mr CP Tan to leave the messages to you dated 27 June 1994. Per your instruction, to look for jobs, during these few days. Please do not deduct any of my salary and try to take the advantage by doing that, two continued absent days without reasons will treated as termination of jobs automatically.

To date Mr Lim Leong Chong's instruction to Mr Ong to refuse to issue me, the income tax clearance EA form for me to clear my income tax, with less taxable amount under the clause of compensation of loss of employment of the amounts, which the company stated (about \$20,000), for your immediate action is much appreciated. I shall be back to work on 2 July 1994 Saturday and my last day on 4 July 1994 Monday.

Thank you.

It is observed that exh CL-5 disclose the following, namely:

- (i) the applicant's unhappiness over his proposed transfer;
(ii) the fact that the respondent had prohibited the applicant from entering the factory;
(iii) the respondent had agreed to pay four months salary as compensation if the applicant gave the respondent a specific date he wanted to leave, or
(iv) that he was constantly pressured by Mr See Tiou Kee (COW-1) to leave the company.

Paragraph 1 of CL-5 should be read in context of para 2 of the same. In paragraph 2 of CL-5, the applicant stated that he would appreciate the 'immediate action' of COW-1 in respect of whether the company could include the sum of 'about RM20,000' under the clause of compensation for

- A** loss of employment in the EA form. He concludes CL-5 by informing the company that he will be back to work on 2 July 1994 and that his last day will be on 4 July 1994. Thus I am of the opinion that the applicant was not pressured by the first respondent to leave the company.

- B** Another important question to be addressed here is when was the applicant dismissed? Was it on 27 June (ie when he wrote CL-5) or was it his last day of work? (ie 4 July 1994). From the applicant's conduct, it is apparent that he himself is not sure when. On p 7, encl 11 the respondent admits the following:

I can't remember last day of work as it happened some time ago.

- C** On the issue of including the sum of 'about RM20,000' under compensation for loss of employment it came about from the contents of exh CL-6, the applicant's CP 22A form dated 24 June 1994. From the notes of evidence it is noted that COW-2, Mr Lim Long Choong, the applicant's immediate superior and General Manager of the company told the Industrial Court that he had spoken to the applicant towards the end of June 1994. He testified that the applicant told him he wanted to leave the company and asked him whether the company could pay him some money, ie four months salary. He further testified that he spoke to COW-1 about the matter and COW-1 told him of the applicant's family problems and in light of the same, COW-1 was prepared to give the applicant up to a maximum of four months salary. COW-2 admitted that after seeing COW-1, he called the applicant in and conveyed the company's decision regarding his request for four months salary. This was either on 22 or 23 June 1994. He further confirmed that he did tell the applicant that if he wanted to leave the company, he should tell the exact date in order to enable him to instruct the accountant to prepare his income tax clearance forms.
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- F** Based on the applicant's decision to leave the company on 4 July 1994, COW-2 instructed the accountant to prepare CL-6. He also confirmed that he did not show COW-1 exh CL-6. COW-2 told the court that the next time he met COW-1 regarding the claimant was on 27 June 1994. He was called in by COW-1 and shown a copy of exh CL-5. COW-2 confirmed that he told COW-1 that the applicant wanted the payment in full but the company could not allow it. He told the court further that the four months salary was not put under compensation for loss of employment because it was the applicant who wanted to leave the company and not vice-versa. COW-2 said:
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- H** If I put in this column (e) of CL-6, it means company asked him to go. The company did not ask him to go. To put on any column must be very careful. (see pp 16 and 17 of encl 11).

Further it transpired from the notes of evidence that COW-2 confirmed that CL-6 was given to the applicant for his further action. It is pertinent to note that COW-2 confirmed that other than CL-5, the applicant did not write to the company asking them to alter or amend the contents of CL-6. COW-1 and COW-2 both denied any knowledge of the applicant's allegations that he was pressured by COW-1 to leave. During the

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cross-examination of COW-2, much emphasis was placed on the wording of para 8.4 of the company's statement in reply, ie '... The company was prepared to pay him four months salary in recognition of his service with the company'. A perusal of para 8.4 does not reveal the words 'compensation for loss of employment'. There is surely a big difference between 'recognition of service' and 'compensation for loss of employment'.

I have observed that the contents of CL-5 clearly do not reflect the situation of an employee being pressured or driven out of employment. It does not seem logical for the applicant to on the one hand, claim that he was pressured to leave but on the other, write to the company and inform them of his whereabouts and confirm that he will be returning to work on 2 July 1994 and that his last day would be 4 July 1994. If he was forced or pressured out, this was not stated in CL-5, he would have left straight away and not returned to work and continue to work until 4 July 1994. The fact of the matter is that he wanted some financial assistance before resigning. The company agreed. The company also advised him to look for a job before resigning. The applicant tendered his resignation and his last day of service was 4 July 1994. His only grievance or complaint as I see it was that the company did not want to include the 'about RM20,000' under compensation for loss of employment.

Now I come to the two proposals of transfer and I observe that both were rejected by the applicant. They were merely proposals of transfer to associated companies of which COW-1 was also the Executive Director and were on terms and conditions which did not entail any loss of status, salary or other benefits the applicant enjoyed at the material time. Although there was nothing in writing about the proposed transfers either by the company or the applicant, COW-1 was frank and honest about the same. He confirmed in court that he did make such proposals to the applicant (see p 10 of encl 11).

Although the applicant's contract of employment is silent on transfer (see exh CL-1) but it expressly states that the company is part of the Kian Joo Group. Alfred Avins in his treatise *Employees Misconduct* addressed the issue of an implied and/or inherent right to transfer in the following terms:

The large majority of reported cases concerning transfer are Indian, and they have uniformly held that where an employer has several branches in different cities and nothing is stated in the contract of service regarding transfer, the employer's right to do so is implied, and disobedience of a transfer order is misconduct.

On p 243 last para Alfred Avins wrote:

In one case where an employee's contract said, 'Your headquarters will be Madras' the Madras Labour Court held that this did not mean that the employee could not be transferred. The court construed this language as merely meaning that 'you will for the present work in Madras'. The Court concluded:

'The liability to be transferred from one place to another by the employer is an implied condition of service of every employee ... It can only be taken away or curtailed or regulated in express terms ... Therefore, unless

A the terms of employment provide otherwise, the company has got the right to transfer and it really for the employee to show that there was a contracting out of this position.'

CP Mills in his book *Industrial Disputes Law in Malaysia* acknowledged the right to transfer an employee from one job to another. He wrote at p 75 of his book as follows:

B It is well settled that, normally, the right to transfer an employee from one place to another is the prerogative of the management and an employer is entitled to require his employee to work anywhere.

C In *Regal Transport Co Sdn Bhd Ipoh v Transport Workers' Union* [1987] 1 ILR 247 the Industrial Court acknowledged the inherent right of the company to transfer its workers. The court held, inter alia, as follows:

4 In an Indian case (see p 244 of *Alfred Avins Employees Misconduct* (2nd Ed) it was stated:

D The liability to be transferred from one place to another by the employer is an implied condition of service of every employee ... it can only be taken away or curtailed or regulated in express terms ... Therefore, unless the terms of employment provide otherwise, the company has the right to transfer and it is really for the employee to show that there was a contracting out of this position.

E 5 This court associate itself, with respect, with the views so well and succinctly, expressed above of the positions both in common law as well as in industrial law.

F It is observed that the applicant in the instant case did not in his letter claiming constructive dismissal highlight or even address the issue of transfer. He did not even go on transfer for a day. He rejected both the proposals outright. In *Antah Sandilands Sdn. Bhd. v Teh Sing* [1994] 2 ILR 40 at p 45 the court said:

G The Court is not satisfied what the company did was not fair to the claimant. It is the company's prerogative to decide what product the claimant is to be in charge of. The company believes and believes honestly that the company should put more emphasis on one-way products in accordance with market trend. There is nothing wrong in that. The claimant failed to prove the ingredients of demotion as stated by Salleh Abbas LP in the *Wong Chee Hong's* case, specifically to be in charge of the one-way products in the central regional was less important in terms of responsibility than to be in charge of all the company's products in the northern region. In the court's opinion to develop the market and to exploit the potential of the one-way products and to acquire new business in the central regions was just as important.

H The court also takes into account that the claimant considered himself constructively dismissed the very next day after he received his new job specifications. The court feels he ought to have discussed the matter with the general manager whom he claimed to be his mentor. If an employee commits a misconduct he is not straight away dismissed by the employer. The employer is expected to give the employee a warning that he may lose his job if he does not improve himself. By the same token an employee who is not happy with the conduct of his employer should at least give the employer a chance to explain its action.

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Therefore, in the light of the above authorities, I am of the view that the proposed transfer did not tantamount to a fundamental breach bearing in mind the fact that the respondents had the right to transfer and both proposals were at the very outset rejected by the applicant and the applicant never mentioned this issue in his letter dated 27 June 1994 (CL-5). The contents of CL-5 clearly reflects it more to be a letter of resignation of the claimant rather than a claim for constructive dismissal. A perusal of the same does not reveal anything but the applicant's dissatisfaction over the 'clause on compensation' and nothing more.

In *Food Specialities (M) Sdn Bhd v M Halim bin Manap @ Abd Manaf* [1992] 2 ILR 311 at p 314 the Industrial Court held as follows:

Apart from the oral testimony, the documentary evidence is succinctly clear to indicate the intention of the claimant. The contents of the letter of resignation are simple and straightforward and purposeful. There is no justification for this Court to import words that are not in the letter. The claimant has clearly and unequivocally terminated his contract of employment by his own resignation and the resignation has been accepted by the company.

Mr Shankar, the claimant's counsel has urged me in his submission to see something behind the resignation. I have seen the words but have not been able to find the trees. It is not possible to put a square peg in a round hole, even this court stretches to the very limit in the name of social justice.

The law relating to constructive dismissal has been authoritatively restated by the Supreme Court in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at pp 96-97:

Looking at the award, it is clear to everyone that the Industrial Court in coming to the conclusion that the appellant was dismissed did not misdirect itself in law. The court only spoke of constructive dismissal in the context of the contract test. It never even made any reference to the unreasonableness test. This is made clear by the following passage at p 9 of the award:

'Past cases of constructive dismissals dealt with by this court ... are agreed that whether or not there has been constructive dismissal is to be determined by the contract test: that is, did the employer's conduct amount to a breach of contract which entitled the employee to resign? And did the employee make up his mind and act at the appropriate point in time soon after the conduct of which he complained had taken place.'

(Otherwise he would be regarded as having elected to affirm the contract and would lose the right to repudiate the contract, ie to treat himself as discharged.)

(The words in brackets are ours.)

We accept this passage to be the correct statement of the law. The question asked by the Industrial Court in fact are similar to that part of the judgment of Lord Denning MR in *Western Excavation's* case where the learned Master of the Rolls set out the contract test. Only in those circumstances can an employee be held to be constructively dismissed and that is what constructive dismissal is.

The Supreme Court in affirming and applying the 'contract test' laid down by Lord Denning in *Western Excavating (Ecc) Ltd v Sharp* [1978] 1 All ER 713 at p 95 said:

- A** Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed.

- B** Therefore I am of the opinion that it was incumbent upon the applicant to establish that the respondents committed a fundamental breach which went to the very root of the applicant's contract.

- C** A perusal of the learned chairman's award, at exh 'TCH-6' from pp 81 to 91 of encl (9) clearly reveals that he did indeed apply the correct principles of the law relating to constructive dismissal. The learned chairman correctly applied the contract test as laid down by the Supreme Court in *Wong Chee Hong v Cathay Organization* referred to above. At p 85 of encl (9), the learned chairman found for a fact that the transfer of the applicant was merely proposals and as he had rejected the same and continued working as usual, there was no fundamental breach.

The Industrial Court further came to the following finding:

- D** To say that it was a demotion cannot hold water due to the fact that there was no evidence at all from him ...

At pp 87 and 88 of the award, the learned chairman considered in detail the final correspondence from the applicant, ie CL-5 where he found for a fact as follows:

- E** Furthermore nothing in CL-5 the claimant had indicated that he was claiming constructive dismissal, he was not allowed to enter the company's premises anymore, the company was to pay him four (4) months salary or he was pressured by COW-1 to leave the company. Instead he had asked the company not to treat his absence to tantamount to a termination but informed COW-1 that he would be back to work in the company on 2 July 1994 and his last day in the company would be Monday 4 July 1994.

This showed that he had no plan to claim constructive dismissal for if he wanted to do that he would have left the company there and then if he claimed he was pressured to leave which was denied by the company.

- G** The Industrial Court made further findings of fact at p 90 that the applicant was not dismissed:

There was no convincing evidence at all from the claimant that he was asked to resign or leave the company as alleged by him.

The court was unable to believe him on this as he had nothing to substantiate it.

- H** It is apparent from the award cited above, the learned chairman had properly guided himself in terms of the burden of proof and the law relating to claims for constructive dismissal. From the documentation and evidence before him, the learned chairman came to a finding of fact that on the totality of evidence, the appellant had resigned from the respondent company on his own accord and as such dismissed his claim for constructive dismissal. He had considered all the relevant issues that were pleaded, ie the proposed transfers, alleged pressure by COW-1 for the applicant to leave etc and came to a finding of fact based on the credibility of witnesses.
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The role of the court in judicial review is to exercise a supervisory not appellate jurisdiction. Judicial review is not an appeal from a decision but a review of the manner in which the decision was made. The Court of Appeal in *William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 AMR 2585 held that a court cannot utilize certiorari proceedings as a cloak to entertain an appeal against findings of fact. At p 2590, the Court of Appeal said:

the question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in *Rama Chandran and Amanah Butler* may be, it does not include the review, in certiorari proceedings, of findings of fact based on the credibility of witnesses.

In *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417, the Supreme Court held:

- (1) Judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable.
- (2) The Industrial Court in this case had heard evidence from both sides and it came to a decision exculpating Tan Seen Khaw. It is not the function of the High Court in the exercise of its supervisory jurisdiction to hear a dispute de novo and decide it on its merits. This is not a case where the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence it could not reasonably come to.

The Supreme Court in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 at p 206, the Supreme Court said:

The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction, unless the decision maker has reached absurd results or reached results absurdly.

In the instant case the Industrial Court did not reach absurd results or reached results absurdly. The Industrial Court had applied the correct test (ie the 'contract test') and came to a finding of fact that the applicant had failed to discharge the necessary burden that he had been constructively dismissed. It had taken into account all relevant matters/facts and did not consider irrelevant facts/matters when coming to its decision. It must be observed that the High Court in exercising its supervisory jurisdiction over inferior tribunals are reluctant to interfere in the findings of such tribunals especially when the tribunal concerned had applied the right test and came to a finding of fact which in all circumstances was not absurd.

In *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 at p 136 the Federal Court stated:

In the instant case, the High Court entirely agreed with the Industrial Court that there was no redundancy. Indeed it could not do otherwise on the evidence. But even assuming for the moment that the High Court would be

A correct in disagreeing with the Industrial Court on what is essentially a finding of fact and disregarding the ouster provisions in the Act, we would adopt the words of May J in *London Transport Executive v Clarke* [1980] ICR 532 pp 538-539.

B ... though we may disagree with it as a matter of fact, (we do not think) it can be upset on appeal by this appeal tribunal. We think it of prime importance in these cases that, unless it can be demonstrated that the Industrial tribunal has gone wrong in law, this appeal tribunal should uphold the decisions of Industrial tribunals who after all are there as the Court of Appeal has said, to decide these very things; and the whole purpose, efficacy and informality of Industrial tribunals just as with so many other domestic tribunals that exist in modern society, would be undermined completely, if after a minute examination as it was described in one case, the appeal tribunal was prepared to disturb decisions of Industrial tribunals which otherwise did not err in law.

D In the case of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 the Federal Court held that an application for the prerogative order of prohibition is not an appeal and neither the High Court nor the Federal Court is entitled to review the merits of any decision reached by the Industrial Court. On p 393, the Federal Court went on to state:

E ... Upon this point we need do no more than to refer to the following passage in the speech of Lord Brightman in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at p 514, [1982] 1 WLR 1155 at p 1173:

F 'I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed in *Ridge v Baldwin & Ors* [1963] 2 All ER 66 at p 91; [1964] AC 40 at p 96. His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to:

G "... a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice ... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case." '

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.'

H At p 394 the Federal Court concluded its judgment with the following passage:

In *Kewal Krishanan v Minister for Local Bodies & Ors* AIR 1959 J & K 17, the order of the Minister was challenged on the ground, inter alia, that the reasons contained in the order made by him contained wrong reasons for his decision. Wazir CJ, in refusing relief said (at p 19):

I 'Although the reasons given in the order of the Minister may be erroneous yet if the order can be supported on other valid grounds, writ of certiorari to quash that order cannot be granted.'

Suffice to say that in the circumstances of this case, the ultimate decision being correct, no injustice of any sort, whether substantial or inconsequential, has been occasioned because of the alleged wrong reasons.

For the aforesaid reasons, the applicant's claim dated 22 July 1998 in encl 13 is hereby dismissed with costs.

Application dismissed.

Reported by Jafisah Jaafar

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